No. 82-2147

In the Supreme Court of the United States

OCTOBER TERM, 1983

INTERNATIONAL ASSOCIATION OF HEAT AND FROST INSULATORS AND ASBESTOS WORKERS LOCAL 17,

Petitioner,

v.

DENNIS M. YOUNG AND MICHAEL MORAN,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the "full and fair hearing" requirement of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §411(a)(5)(C), is violated when one is expelled from membership in his union as a consequence of action taken by a committee or trial board, half of which is composed of *employers*.

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OPINIONS BELOW

The unpublished order of the United States Court of Appeals for the Seventh Circuit appears at pages 1 through 9 of the Appendix to the Petition. The unpublished order denying a motion for rehearing, with suggestion for rehearing *en banc*, appears at page 10 of the Appendix to the Petition. The unpublished final judgment order and memorandum opinion by the United States District Court for the Northern District of Illinois, Eastern Division, appears on pages 11-16 of the Appendix to the Petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on February 15, 1983. A petition for rehearing, with suggestion for rehearing *en banc*, was denied on March 29, 1983. The mandate was stayed through June 27, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(i).

STATUTES INVOLVED

Section 101(a)(5)(C) and §101(b) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §411(a)(5)(C) and (b) are the statutes involved. Section 101(a)(5)(C) of the Act provides: "**Safeguard Against Improper Disciplinary Action.** No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing." Section 101(b) provides that: "Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect."

STATEMENT

For several years prior to 1978, the respondents were apprentices in a program administered by the Joint Apprenticeship Committee ("JAC"), which was comprised of an equal number of representatives from Local 17 of the International Association of Heat and Frost Insulators and Asbestos Workers and from various insulation

contractors. In 1978, this joint management-labor committee, by a vote of 6 to 2,[1] voted to terminate the respondents' participation in the apprenticeship program due to their failure to have worked the requisite number of hours under the rules of the apprenticeship program.[2]

This decision was affirmed by the Joint Trade Board, a body comprised equally of representatives from the union and the employer-contractors. As a consequence of their expulsion from the apprenticeship program, the respondents were expelled from the union pursuant to a provision in the union's by-laws which provided for automatic non-reviewable expulsion from the union upon termination from a joint apprenticeship program. (Pet. App. 14).

The respondents filed suit seeking reinstatement in the union. In essence, the complaint charged that the respondents did not receive the "full and fair hearing" mandated by the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. §411(a)(5)(C), since their expulsion from the union ultimately was precipitated by action of a trial body comprised of employers.

In a carefully circumscribed decision, the district court held that under the Act expulsion from union membership was impermissible if it resulted from action of a tribunal comprised largely of employers. Accordingly, the court ordered the respondents to be reinstated *in the union* in the limited status they enjoyed before their automatic ex-

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[1] All four contractors voted to remove the respondents from the program. The union representatives split 2 to 2. (Pet. App. 3, n.1). The respondents were not presented with a written specification of charges. (Pet. App. 14).

[2] Respondent Young was one hour short of meeting the requirements.

pulsion and, pursuant to 29 U.S.C. §411(b), declared void the automatic expulsion provision of the union constitution. The court held it had no authority to order the respondents to be reinstated in the apprenticeship program, and it refused to make a monetary award of damages. (Pet. App. 11; 14).

In an unpublished order, the Seventh Circuit affirmed. The court held that LMRDA's goal of promoting democratic self government would be impaired if employers were allowed to have a role in the exceedingly sensitive and necessarily internal area of expulsion from union membership. The court found that, at a minimum, the "full and fair hearing" requirement imposed by LMRDA demanded a tribunal that was unbiased and disinterested. Lacking the necessary community of interest with union members, employers and their representatives cannot mete out discipline to union members. Since the respondents' expulsion ultimately traced its origins to action by a trial board composed largely of employers, the respondents were denied a "full and fair hearing" within the meaning of §411(a)(5)(C). (Pet. App. 1-9).

In this Court, as in the court below, the petitioner has advanced the startling argument that absent a showing of actual bias on the part of a member of a disciplinary tribunal, there cannot be a violation of LMRDA's requirement of a "full and fair hearing", *even though the tribunal is composed of employers.*[3] Despite the Petition's labored

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[3] We are confident that in no prior case has a union advanced the proposition that management has the right, however indirectly, to be involved in a union's internal disciplinary process.

efforts, a careful reading of the court's narrow holding[4] leads irresistably to the firm conclusion that it does not contravene the general legislative policy of limited judicial intervention in union self-government, that it is not in conflict with the decisions of other circuits, and that it does not present a question of general importance, but rather one limited to the singular facts of this case.

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[4] The Seventh Circuit took pains to stress the narrowness of the district court's decision and its own affirmance. Thus, the court pointed out that neither its decision nor that of the district court questioned the propriety of the respondents' expulsion *from the apprenticeship program* at the hands of an employer-union committee; neither opinion questioned any part of the apprenticeship program or the standards under which it was created or operated. Finally, neither decision interfered with the operation of the union's collective bargaining agreement or sought to interfere with union-employer collaboration in the operation of joint apprenticeship programs. (Pet. App. 7-8). Thus, the petitioner's suggestion that the fate of jointly administered apprenticeship programs may be at stake (Pet. at 18) is nothing more than an unsupportable *in terrorem* argument advanced to give an aura of importance to a very straightforward case.

REASONS FOR NOT GRANTING THE WRIT

A.

The years prior to 1959 had witnessed a sordid pattern of abuses and breaches of trust by unions against their rank and file members. In an attempt to eradicate these abuses, to foster union democracy, and to vouchsafe minimum standards of democratic process, Congress passed the Labor-Management Reporting and Disclosure Act of 1959. Title I of the Act guarantees to all union members certain substantive rights which Congress deemed essential to rank and file involvement in union affairs. No less important are the provisions of the Act which enunciate minimal standards of procedural due process for the protection of members subject to union discipline. *See Hall* v. *Cole*, 412 U.S. 1 (1973); *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 194 (1967).

Thus, §101(a)(5)(C) of the Act, 29 U.S.C. §411(a)(5)(C), prohibits the disciplining of any member by a union unless he is afforded a "full and fair hearing." While the union member need not necessarily be provided with the complete panopoly of rigid procedural safeguards found in criminal proceedings, fundamental and traditional concepts of due process do apply.[5] Since, under the due pro-

[5] *See* Rosario v. Amalgamated Ladies Garment Cutters Local 10, 605 F.2d 1228, 1240 (2d Cir. 1979); Ritz v. O'Donnell, 566 F.2d 731, 735 (D.C. Cir. 1977); Tincher v. Piasecki, 520 F.2d 851, 854 (7th Cir. 1975) (and cases cited); Falcone v. Dantinne, 420 F.2d 1157, 1166 (3d Cir. 1969) (and cases cited). *Cf.*, International Brotherhood v. Hardeman, 401 U.S. 233, 246 (1971) ("Senator Kuchal, who first introduced [the full and fair hearing provision of LMRDA] characterized it, on the Senate Floor, as requiring the 'usual reasonable constitutional basis' for disciplinary action.").

cess clause, there cannot be a fair trial without an impartial and fair decision maker, *Withrow* v. *Larkin*, 421 U.S. 35, 46-47 (1975); *Estes* v. *Texas*, 381 U.S. 532, 543 (1965), it is not surprising that every federal court which has addressed the issue has held that the "full and fair hearing" requirement of §411(a)(5)(C) demands that the union tribunal be impartial and unbiased.

Sensitive to Congressional insistence that basic due process considerations apply to union disciplinary proceedings, the lower courts have been virtually unanimous in recognizing that, quite apart from any question of actual bias on the part of the decisionmaker, the composition of a hearing tribunal may be an integral determinant of the fairness, *vel non*, of a particular proceeding.[8] Thus, while

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[8] *See, e.g.*, Perry v. Mill Drivers Employees Union, 656 F.2d 536 (9th Cir. 1981) (trial panel dominated by persons whose political interests would be served by the imposition of penalties cannot be condoned); Felington v. Moving Picture Machine Operators, 605 F.2d 1251 (2d Cir. 1979) (same—no need to show actual bias); Rosario v. Amalgamated Ladies Garment Inc., 605 F.2d 1228, 1243 (2d Cir. 1979) (trial panel comprised of one or more persons who have previously heard identical charges and adjudged accused to be guilty cannot give full and fair hearing); Tincher v. Piasecki, 520 F.2d 851, 854 (7th Cir. 1975) (panel comprised of one of more who were present at earlier trial does not satisfy requirement of a full and fair hearing, nor does a panel on which sat a person who has been charged by an accused in a collateral proceeding); Falcone v. Dantinne, 420 F.2d 1157, 1161-62 (3rd Cir. 1969); Kiepura v. Local 1091, 358 F.Supp. 987, 991 (N.D. Ill. 1973) (trial panel may not have on it anyone who witnessed the events in question); Pawlak v. Greenwalt, 464 F.Supp. 1265, 1271 (M.D. Pa. 1979); Stein v. Mutual Clerks Guild, 384 F.Supp. 444, 447 (D. Mass. 1974), *aff'd*, 560 F.2d 486, 491 (2d Cir. 1977) (mere participation, without regard to what was said, in trial panel's deliberations by the person who preferred charges, violates §411(a)(5)(C).

courts do not "have the affirmative authority to determine the composition of [a] Trial Committee, [they] do have the duty to decide when it is improperly constituted." *Kiepura* v. *Local 1091*, 358 F.Supp. 987, 991 (N.D. Ill. 1973).[7] This theme found more elaborate expression in *Rosario* v. *Amalgamated Ladies Garment Cutters Local 10*, 605 F.2d 1228, 1240 (2d Cir. 1979):

> ". . . the national policy against judicial interference in the internal affairs of unions is 'subject to important exception in specific areas in which Congress has found that the interests of individual members need special protection against the danger of overreaching by entrenched union leadership.' [citations omitted]. The union member's bill of rights generally, *including its full and fair hearing requirement, is one such area. While federal courts surely do not exercise 'supervisory powers' over union tribunals they have the duty to insure that unions satisfy Congress' mandate of fairness in union disciplinary proceedings.* To paraphrase *Wirtz* v. *Local 153, Glass Bottle Blowers Ass'n*, 389 U.S. 463, 471 . . . *the freedom allowed unions to run their disciplinary proceedings was reserved for those proceedings which conform to the 'due process' principles written into §101(a)(5).*" (Emphasis supplied). *Accord McDonald* v. *Oliver*, 525 F.2d 1217, 1232 (5th Cir. 1976).

To properly fulfill this duty, the federal courts cannot be limited—because due process is not limited—to cases involving actual bias. Rather, courts must also be able to act in those "various situations . . . in which experience teaches that the probability of bias on the part of the . . .

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[7] *Compare*, Steelworkers v. Sadlowski, 457 U.S. 102, 111, n.4 (1982) ("courts are to play a role in the determination of reasonableness" under §101(a)(2) of LMRDA).

decisionmaker is too high to be constitutionally tolerable." *Withrow* v. *Larkin*, 421 U.S. 35, 47 (1975).*

The decision below is faithful to these principles and to the vivifying spirit of the Act itself. The court of appeals did not arrogate unto itself the right to prescribe how union disciplinary tribunals should be composed. On the contrary, it explicitly disavowed the notion that the Act invests federal courts with any such general supervisory power. (Pet. App. 4). The court merely held that LMRDA does not authorize *employers* to play a role in a union's internal disciplinary process. (Pet. App. 6-7). This decision is indisputably correct.

Exclusion of management from involvement in matters connected with internal union discipline is at once consistent with and mandated by the history of labor legislation in this Nation and the particular policies on which LMRDA itself is bottomed. Indeed, acceptance of the union's position to the contrary would signal a radical break with and subvert the goals subserved by LMRDA.

The "primary" and "overriding objective" of LMRDA was to insure "that unions would be democratically governed and responsible to the will of their memberships." *Finnegan* v. *Leu*, 456 U.S. 431, 436, 441 (1982). *See also Hall* v. *Cole*, 412 U.S. 1, 7-8 (1973) (rights in Title I of LMRDA are "deemed 'vital to the independence of the membership and the effective and fair operation of the union as the representative of its membership.' "); Pet. App. 5.

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* In the context of LMRDA, *Withrow* has served as the predicate for the holding that "it is inherently improper for a person who has been charged by an accused in a collateral proceeding to participate as a committee member in the accused's disciplinary hearing." Tincher v. Piasecki, 520 F.2d 851, 855 (7th Cir. 1975). A joint employer-labor disciplinary tribunal likewise presents an intolerably high risk of inherent bias. *See* discussion, *infra* at 10.

To that end, LMRDA explicitly prohibits employer involvement in internal union affairs. For example, Title IV of the Act prohibits the use of employer funds in election campaigns. "This ban reflects a desire to minimize the danger that employers will influence the outcome of union elections." *Steelworkers* v. *Sadlowski*, 457 U.S. 102, 117 (1982). Similarly, Title I prohibits employers directly or indirectly from financing, encouraging, or participating in suits by union members against their unions. 29 U.S.C. §411(a)(4). So pivotal and imperious is LMRDA's goal of union democracy that this Court has sustained rules barring union members from accepting campaign contributions from non-members even though those rules might well affect vigorous debate and favor entrenched union leaders. *See Steelworkers* v. *Sadlowski*, *supra*, 457 U.S. at 112, 115-116.

The conclusion that employer involvement in a union's internal disciplinary process would be alien to LMRDA's goals is further buttressed by the fact that the relationship between labor and management is essentially adversarial.[9] It is not necessary to track the odyssey of development of labor legislation in this Country to realize that the labor-management relationship is not one between equals having a commonality of purpose, but rather is one of economic inequality and dependence among groups lacking shared

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[9] The adversarial nature of this relationship is not attenuated by the existence of apprenticeship programs, jointly administered by a labor-management committee. Obviously, there are areas of common ground such as insuring that workers are properly trained, resolving questions of job seniority in the event of a company's sale or merger, Humphrey v. Moore, 375 U.S. 335 (1964) (Pet. at 18, n.15), and other matters equally affecting both groups. This limited commonality of interest cannot, however, obscure the fact that the labor-management relationship is essentially a conflictual one.

and enduring goals. *See NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 617-18 (1969); *Shelton* v. *Tucker*, 364 U.S. 479, 486 (1960); *NLRB* v. *Virginia Power Co.*, 314 U.S. 469, 477 (1941).

It is this essentially antagonistic role which makes unthinkable management involvement in matters affecting internal union discipline, for management's role as labor's adversary precludes it from having the requisite degree of impartiality and fairness which §411(a)(5)(C) demands. Phrased differently, management involvement in union disciplinary matters would present one of those "various situations . . . in which experience teaches that the probability of bias on the part of the . . . decision maker is too high to be constitutionally tolerable." *Withrow* v. *Larkin*, 421 U.S. 35, 47 (1975).

In addition to subverting the goals of union democracy and union autonomy, employer involvement in union discipline would undermine fair and unbiased *union* participation in the disciplinary process. This Court has long recognized that as a consequence of the economic dependency of employees on their employers, the latter can exert a subtle influence on various decisions which the employee may be called upon to make. *See, e.g., NLRB* v. *Gissel Packing Co., supra*, 395 U.S. at 617-18; *Shelton* v. *Tucker, supra*, 364 U.S. at 486; *NLRB* v. *Virginia Power Co., supra*, 314 U.S. at 477. Indeed, "the necessary tendency of [employees], because of that [economically dependent] relationship, [is] to pick up intended implications of the [employer] that might be more readily dismissed by a more disinterested ear." *NLRB* v. *Gissel Packing Co., supra*, 395 U.S. at 617-18.

One need not be a master of psychology to appreciate the subtly coercive impact which an employer-member of a disciplinary committee could exert on his union counter-

parts. Under such circumstances, fair, voluntary, and unbiased employee participation in the disciplinary process would be a practical impossibility. It is thus fanciful to suggest that a joint employer-union disciplinary committee can have the necessary degree of detachment required of decisionmakers by those fundamental due process considerations which Congress has woven into the very fabric of LMRDA.

In sum, the plain language of LMRDA,[10] its legislative history, and the decisions of this and the inferior federal courts make clear that expulsion from union membership cannot pass muster under LMRDA where the disciplinary tribunal is composed of employers.

B.

None of the three cases cited by the Petition are comparable, let alone contrary, to the decision below, for not one involved discipline of a union member by a panel on which sat one or more *employers*.

Among the issues presented in *Ritz* v. *O'Donnell*, 566 F. 2d 731 (D.C. Cir. 1977) (Pet. at 14), was whether Ritz, an airline pilot and member of the union, the Airline Pilots Association, was denied a "full and fair hearing" by virtue of the fact that two of the members of the disciplinary panel, who were themselves union members, were employed by United and Braniff Airlines, which were the

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[10] By its plain terms, §411(a)(5)(C) precludes employer participation in the disciplinary process: "No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues *by such organization or by any officer thereof* unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing." (Emphasis supplied).

employers of the two captains who instituted the charges against Ritz. In a 2 to 1 decision, the panel rejected the argument that the Act was violated merely because the two members did not recuse themselves as required by the union's own rule requiring disqualification in any case involving pilots of their own airline. The panel held that the charging parties were not employed by the airlines at the time the matter was heard and that any involvement was nominal. 566 F.2d at 737.

Ritz obviously differs from this case, *toto coelo*, for unlike the situation which obtains here, *all of the members of the panel which disciplined Captain Ritz were themselves union members*! Precisely the same circumstances obtained in *Martire* v. *Laborers' Local 1058*, 410 F.2d 32 (3d Cir.), *cert. denied*, 396 U.S. 903 (1969). (Pet. at 16). There, the plaintiff was a member of Laborers Local 158 and "*an elected delegate to the Laborers District Council of Western Pennsylvania, with which the union was affiliated.*" 410 F.2d at 33 (Emphasis supplied). Pursuant to the District Council's constitution, three delegates to the Council filed charges against the plaintiff. Thereafter, he was tried by the District Council Trial Board which found him guilty. The action of the trial board was ratified by the District Council and, "after a hearing, by the general Executive Board of the International Union" as well. *Id.* at 34. The plaintiff filed suit against the union, claiming that the full and fair hearing requirement of LMRDA afforded him the right to be tried by his own Local.

Nothing in the court of appeals' rejection of this argument remotely suggests that trial by *management* is permissible under the Act. The court merely held, that "the fact that a local union member is disciplined by a *parent body within the union* does not constitute *per se* a denial of a fair hearing." The court posited that the situation would be different if the conflict involved an issue with

respect to which there was "a conflict of interest" between the local and the parent body. *Id.* at 37 (Emphasis supplied).[11] Thus, in *Martire*, as in *O'Donnell*, the trial board was comprised entirely of union members.

We come then to the last in the trilogy of cases relied on in the Petition, *Park* v. *Int. Brotherhood of Electrical Workers*, 314 F.2d 886 (4th Cir. 1963), *cert. denied*, 372 U.S. 976 (1964). (Pet. at 15). There a renegade local, which had engaged in an unauthorized strike, was expelled from the international union following a trial before the president of the international and appellate review by the International Executive Council. In rejecting the claim that the trial by the international president was not "full and fair", the court of appeals summarily held that it was permissible for the president to have at once acted as prosecutor and judge in the case. *Id.* at 913. The court held that while a dichotomy of functions might be desirable, federal courts "are justified in ruling a *union* tribunal biased only upon a demonstration . . . of specific prejudice." *Id.* (Emphasis supplied).

Quite apart from the questionable nature of the court's cramped construction of §411(a)(5)(C), the decision has no relevance to this case since the discipline dispensed there, in the words of the *Park* opinion, came from a "*union* tribunal". That is, in *Park*, as in *Ritz* and *Martire*, the hearing was conducted before a body comprised entirely of union members, not as here, a hybrid management/labor body.[12]

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[11] The relationship between management and labor is, by its very nature, adversarial. It is the existence of this inherent conflict of interest which precludes management from having a role in internal union discipline.

[12] Additionally, in all three cases there was internal *union* review of the disciplinary decisions. Here, the expulsion was not only automatic, but non-reviewable as well. (Pet. App. 3, n.2).

C.

At the close of the Petition, there is the anguished claim that corrective action by this Court is necessary lest the decision below result in the invalidation of provisions in the constitutions of several unions providing for "*Public Boards* to consider and rule upon disciplinary action taken against union members." (Pet. at 17) (Emphasis supplied). With all deference, only literary perversity or jaundiced partisanship can sponsor this contention.

As we have demonstrated, the decision below held only that §411(a)(5)(C) does not condone *management* involvement in a union's internal disciplinary process—nothing more. Neither the court of appeals nor the district court was presented with, nor did they purport to decide, the radically different question of whether " '*independent public review boards*' ", (Pet. at 16, n.13) (emphasis supplied), some of which employ "*outside legally trained hearing officers*",[13] could provide a "full and fair hearing" within the meaning of LMRDA.[14] Hence, the decision below cannot be dispositive of or even relevant to that question should it ever be presented for adjudication. For it is fundamental that prior precedent cannot be controlling unless there has been a deliberative consideration in the earlier case of the question raised in the later one.[15]

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[13] Brooks, *Impartial Public Review of Internal Union Disputes: Experiment in Democratic Self-Discipline*, 22 Ohio State L.J. 64, 84 (1961) (Emphasis supplied).

[14] While rejecting the claim that *management* can sit on a union trial board, the district court acknowledged that the Act might not be offended if an independent unbiased person, such as an arbitrator, were involved in the disciplinary process. (Pet. at 9, n.8).

[15] *See* City of Kenosha v. Bruno, 412 U.S. 507, 512-13 (1973). *Cf.*, Webster v. Fall, 266 U.S. 507 (1925); United States v. More, 3 Cranch 307 (1810); King Mfg. Co. v. Augusta, 277 U.S. 100, 135, n.21 (1928) (Brandeis, J., dissenting). *Compare* Buckley v. Valeo, 424 U.S. 1, 24 (1976) *with* BreadPAC v. FEC, 455 U.S. 577, 581 (1982).

CONCLUSION

Rule 17 of the Rules of this Court provides that "[a] review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore." Among the reasons which will justify granting of the writ is the issuance of a decision by a federal court of appeals which is in conflict with decisions of other circuits on the same subject or which "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Neither of these criteria for review has been met in the instant case.

Wherefore, we respectfully request that the Petition For A Writ of Certiorari be denied.

Respectfully submitted,

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